COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1569 **Cir. Ct. No. 2005CV219**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CASEY COOK,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Casey Cook appeals a summary judgment in favor of American Family Mutual Insurance Company, his father's underinsured motorist (UIM) carrier. The circuit court concluded there was no coverage under American Family's policy because Cook settled his claims against the tortfeasors

without notice to American Family. Cook argues coverage exists if he can prove American Family was not prejudiced by the lack of notice. While American Family must provide coverage if Cook can prove it was not prejudiced, Cook has not produced evidence creating a material factual dispute as to the absence of prejudice. Accordingly, we affirm the summary judgment.

BACKGROUND

¶2 Cook was seriously injured in a motor vehicle accident in the early morning hours of September 2, 2001. Cook was a passenger in the vehicle, which was driven by Krysti Norton. Cook settled his claims against Norton, another individual, and their insurers, Progressive and Western National, on April 27, 2004.[1]

¶3 Cook first realized that he might have UIM coverage under his father's American Family policy sometime in summer 2004. On August 24, 2004, Cook's attorney notified American Family that he had been retained in connection with the accident and requested a copy of the American Family policy. Cook filed suit against American Family for UIM benefits on February 9, 2005.

¶4 American Family moved for summary judgment. First, American Family contended it was prejudiced as a matter of law because Cook failed to notify it of the accident, making it more difficult for American Family to determine whether coverage existed and the extent of its liability. Second,

[1] Cook also filed a second suit against Gene Norton, Krysti's father, and his insurer, State Farm. Cook dismissed that because he concluded no coverage existed under the State Farm policy. The parties focus their arguments on the initial settlement, and we therefore focus on that settlement as well.

American Family argued it was prejudiced as a matter of law because Cook settled his claims against four defendants without notifying American Family. Finally, American Family argued its policy excluded coverage because Cook had owned another vehicle at the time of the accident. The circuit court granted summary judgment, concluding that the American Family policy unambiguously barred coverage because Cook had settled his claims without notifying American Family.

DISCUSSION

¶5 We review summary judgments without deference to the circuit court, using the same methodology. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[2] WIS. STAT. § 802.08(2); ***Green Spring Farms***, 136 Wis. 2d at 315.[3]

¶6 Cook first takes issue with the circuit court's reliance on American Family's policy language. The circuit court concluded that regardless of prejudice to American Family, there was no coverage because the American Family policy barred coverage where the insured makes a settlement without American Family's consent. Cook argues his defective notice simply establishes a rebuttable

[2] Cook argues that on appeal we should only decide whether the court's reliance on American Family's policy language was correct. However, the issue on appeal is whether summary judgment is appropriate. We decide that issue using the same methodology as the circuit court, which means we consider all grounds for summary judgment raised at the circuit court, not only the one the circuit court ultimately relied on. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987); *see also* ***Flores v. Raz***, 2002 WI 27, ¶7, 250 Wis. 2d 306, 640 N.W.2d 159.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

presumption of prejudice, and coverage exists if he can rebut the presumption. *See* ***Ranes v. American Family Mut. Ins. Co.***, 219 Wis. 2d 49, 52, 580 N.W.2d 197 (1998).

¶7 Cook is correct that ***Ranes*** controls here. Under ***Ranes***, lack of notice required by a policy does not automatically bar coverage; instead, it gives rise to a rebuttable presumption of prejudice. ***Id.*** at 63. This is in part because an insured's failure to give notice is not a material breach of the insurance agreement unless the failure prejudices the insurer. ***Id.*** at 57-58. Absent a material breach, the insurer is not excused from its obligations under the agreement. ***Id.***

¶8 Under the rebuttable presumption in ***Ranes***, an insurer has the burden of proving defective notice. ***Id.*** at 63. Once the insurer does so, the burden of proof shifts to the insured, who must prove lack of prejudice. ***Id.***; WIS. STAT. § 903.01. At the summary judgment stage, the party who has the burden of rebutting a presumption must produce evidence creating a factual dispute as to the existence of the presumed fact. ***Dahm v. City of Milwaukee***, 2005 WI App 258, ¶8, 288 Wis. 2d 637, 707 N.W.2d 922. Here, Cook has the burden of producing evidence on which a trier of fact could conclude American Family was not prejudiced by lack of notice.

¶9 In addition to his failure to notify American Family prior to settling the case, Cook also did not notify American Family of the accident as required by his policy.[4] When an insured fails to give notice of an accident within one year of the time required by the policy, a rebuttable presumption of prejudice is created.

[4] American Family's policy requires notice to be made "as soon as reasonably possible." Cook does not argue he complied with this provision.

Gerrard Realty Corp. v. American States Ins. Co., 89 Wis. 2d 130, 146-47, 277 N.W.2d 863 (1979). This presumption, like the presumption of prejudice created by lack of notice of settlement, shifts the burden to the plaintiff to prove lack of prejudice. ***Id.***; *see also* WIS. STAT. § 632.26.

¶10 In this case, Cook did not give notice of his settlement or timely notice of the accident. In order to preclude summary judgment, therefore, Cook must produce evidence on which a trier of fact could conclude American Family was not prejudiced by the defective notices.

¶11 Prejudice is "a serious impairment of the insurer's ability to investigate, evaluate, or settle a claim, determine coverage, or present an effective defense." ***Neff v. Pierzina***, 2001 WI 95, ¶44, 245 Wis. 2d 285, 629 N.W.2d 177. In this case, Cook has failed to rebut the presumption as to two of the three principal opportunities American Family missed as a result of his lost notice.

¶12 First, American Family was prejudiced when it lost its opportunity to substitute its funds and pursue its subrogation rights against the tortfeasors. *See* ***Vogt v. Schroeder***, 129 Wis. 2d 3, 20-21, 383 N.W.2d 876. Under ***Vogt***, an insured must give its UIM insurer notice and a chance to evaluate any proposed settlement with the tortfeasor. ***Id.*** This gives the UIM insurer a chance to decide whether to substitute its funds in order to protect its subrogation claim against the tortfeasor. ***Id.*** at 21-22. The UIM insurer is well advised to do so in cases where the tortfeasor has significant assets that are likely to be recovered in a subrogation action. *See* ***id.*** at 20.

¶13 Cook does not point to anything in the record indicating American Family's lost subrogation rights against the two tortfeasors are not valuable. Cook merely states that "American Family has not demonstrated it would have done

anything differently in evaluating the claim." However, as noted above, the presumption of prejudice places the burden on Cook to produce evidence on which a fact finder could find a lack of prejudice. *See* ***Ranes***, 219 Wis. 2d at 63; ***Dahm***, 288 Wis. 2d 637, ¶8. Once the presumption is established, American Family is not required to demonstrate anything. *See* ***id.***

¶14 Second, Cook has also been unable to produce evidence related to American Family's lost opportunity to evaluate the condition of the car Cook owned at the time of the accident. At the time of the accident, Cook owned a car that was in storage. Under American Family's policy, Cook will be eligible for UIM benefits only if Cook's car was inoperable to the point that it was not a vehicle for insurance policy purposes. *See* ***State Farm Mut. Auto. Ins. Co. v. Rechek***, 125 Wis. 2d 7, 8-9, 370 N.W.2d 787 (Ct. App. 1985). A car will no longer be considered a vehicle for insurance purposes if "circumstances suggest either that the inoperable condition is probably permanent, or apt to be of long duration with little reasonable possibility of restoring the car to a condition where it can be driven on the roads." ***Id.*** at 11 (quoting ***Quick v. Michigan Millers Mut. Ins. Co.***, 250 N.E.2d 819, 821 (Ill. App. 1969)). Whether a car is a vehicle for purposes of the policy is a question of fact, and the fact finder is to take account of the intent of the "degree of disrepair of the car, the intent of the owner," and other relevant facts and circumstances. ***Id.*** at 11-12.

¶15 Cook's car was a 1985 Oldsmobile Cutlass. Cook bought the Cutlass in April 1999 for $2,500. He drove it until October 2000, when he parked it outside at a garage run by friends. Cook drove it to the garage, but said it had power steering and brake problems and he "didn't think [repairing it] was worth it at the time." He signed the title so that the owners of the garage could sell the car

to any interested buyer. However, the car did not sell, and Cook eventually repaired it and drove it for a time beginning in August 2003.

¶16 American Family did not learn of the accident—and therefore the existence of the Cutlass—until 2005. Because of the delay, it was unable to interview Cook in a timely fashion about what he intended for the car. American Family also was unable to inspect the car to determine what repairs needed to be done as of the date of the accident.[5] The delay therefore prevented a contemporaneous investigation into Cook's intent and the state of the Cutlass—the two important considerations determining whether coverage exists. *See* ***id.*** at 12-13. Cook does not point to any evidence in the record indicating a timely interview and inspection would have been of no use to American Family, and in fact the record virtually compels the opposite conclusion.[6] Cook therefore has not met his burden to produce evidence on which a jury could conclude American Family was not prejudiced by his late notice. *See* ***Gerrard Realty***, 89 Wis. 2d at 146-47.

¶17 Cook argues he has met his burden by introducing voluminous documents relating to Norton's liability for the accident. He argues the documents, which include police reports, records from the criminal case against

[5] Cook provided a list of repairs he performed in 2003. However, it is not clear from his deposition which repairs were for problems existing at the time the car was stored and which were for problems caused by the long outdoor storage period.

[6] The parties both argue they are entitled to summary judgment on the coverage issue. Their arguments show the problem created by Cook's late notice. Both sides rely on competing inferences based on Cook's deposition testimony on the 2003 repairs, the 1999 purchase and 2005 sale price of the Cutlass, and Cook's actions before and after the Cutlass was stored. A 2001 repair estimate, a 2001 blue book value, and 2001 witness statements would be much more useful evidence.

Norton, and depositions, contain all the information American Family would have discovered had it conducted an immediate investigation. *See* ***Ehlers v. Colonial Penn Ins. Co.***, 81 Wis. 2d 64, 69-71, 259 N.W.2d 718 (1977).

¶18 If Norton's liability were the only issue in dispute between Cook and American Family, a fact finder could conclude any investigation would have been duplicative and therefore American Family was not prejudiced by the late notice. However, as noted above, Cook has not rebutted the presumption that American Family was prejudiced by the loss of its subrogation rights and by its inability to investigate the condition of Cook's car. Summary judgment is therefore appropriate, regardless of a dispute as to whether American Family was prejudiced by its inability to investigate the accident in a timely fashion. *See* ***Ranes***, 219 Wis. 2d at 63; ***Gerrard Realty***, 89 Wis. 2d at 146-147.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.